UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 150

Docket No. CH-0752-09-0251-I-1

James M. Helms,

Appellant,

v.

Department of the Army,

Agency.

July 21, 2010

Scott D. Spiegel, Esquire, Louisville, Kentucky, for the appellant.

Michele L. Parchman, Fort Belvoir, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision affirming his indefinite suspension based on the suspension of his access to classified information. For the reasons set forth below, we GRANT the petition and AFFIRM the initial decision as MODIFIED, still sustaining the indefinite suspension.

BACKGROUND

¶2 The appellant is a GG-0132-13 Intelligence Specialist (Operations) in the Fort Knox, Kentucky, field office of the Army Intelligence and Security

Command (INSCOM). Initial Appeal File (IAF), Tab 4, Subtab 4A. He held a Top Secret security clearance, which was a condition of his employment. IAF, Tab 4, Subtab 4L; Hearing Transcript (HT) at 76. The appellant was assigned as the Primary Information Management Officer in the Fort Knox field office and as such was responsible for security and safeguards for information systems. IAF, Tab 14, Subtab 16; HT at 79. On August 27, 2008, the agency suspended the appellant's access to information on the agency's classified computer network, SIPRNET. IAF, Tab 4, Subtab 4H; HT at 10. On October 16, 2008, the agency proposed the appellant's indefinite suspension from duty and pay based on the suspension of his access to classified information. IAF, Tab 4, Subtab 4E. The appellant filed a written response on October 24, 2008. *Id.*, Subtab 4D. The agency effected the indefinite suspension on December 9, 2008, pending a determination by the agency's Central Personnel Security Clearance Facility (CCF) on whether to reinstate the appellant's access to classified information. *Id.*, Subtab 4B.

¶3 The appellant appealed his indefinite suspension. IAF, Tab 1. After holding the hearing requested by the appellant, the administrative judge issued an initial decision affirming the agency's action. *Id.*, Tab 19. The appellant filed a petition for review in which he asserts that the administrative judge erred in precluding witness testimony that would have shown the suspension of his access to classified information was improper and in denying him the opportunity to present evidence regarding his affirmative defense of retaliation for whistleblowing. Petition for Review (PFR) File, Tab 1. The appellant also asserts that the initial decision incorrectly held he had sufficient information to make a meaningful reply to the indefinite suspension proposal. *Id.* The appellant argues that the indefinite suspension is invalid because it no longer has an ascertainable end, since the agency has taken steps to remove him. *Id.* He also argues that the initial decision did not consider alleged improper ex parte communications between the deciding official and the general who designated

that official. *Id.* In addition, the appellant asserts that the initial decision failed to address the fact that the agency changed deciding officials without notice to him, which he claims was harmful error, and that the initial decision failed to consider his claim of disparate treatment. *Id.* The agency has not responded to the petition for review.

ANALYSIS

¶4 The Board may grant a petition for review when the administrative judge makes an error of law or regulation. 5 C.F.R. § 1201.115(d). We have considered the appellant's arguments on petition for review with regard to witness testimony, his opportunity to reply to the indefinite suspension proposal, his whistleblower retaliation affirmative defense, the ascertainable end of the indefinite suspension and alleged ex parte contacts, and we find these arguments lack merit. On each of these matters, we therefore affirm the initial decision's findings. We grant the appellant's petition for review for the purpose of addressing his arguments regarding harmful procedural error and disparate treatment, which were not discussed in the initial decision.

The agency's change in designation of deciding officials was not harmful procedural error.

¶5 The notice of proposed indefinite suspension informed the appellant that he could reply orally, in writing or both to the Company Commander, who was his second-line supervisor. IAF, Tab 4, Subtab 4E. After the appellant submitted a written response, the decision-making authority on the proposal was elevated to the Brigade Commander. HT at 14-15, 33-34, 57, 89. The appellant has asserted on appeal and on petition for review that this change was harmful procedural error, because it denied him the opportunity to make an oral and written response to the deciding official, who was his former commanding officer in Iraq. HT at 90, 131; PFR File, Tab 1 at 11. The initial decision did not address this argument.

¶6 The appellant's indefinite suspension may not be sustained if he can show harmful error in the application of the agency's procedures in arriving at its decision to suspend him. 5 U.S.C. § 7701(c)(2)(A); *Romero v. Department of Defense*, 527 F.3d 1324, 1328-29 (Fed. Cir. 2008); *Rothlisberger v. Department of the Army*, 111 M.S.P.R. 662, ¶ 14 (2009). An appellant bears the burden of proof to show harmful error by the agency in effecting an adverse action. *Henton v. U.S. Postal Service*, 102 M.S.P.R. 572, ¶ 15 (2006); 5 C.F.R. § 1201.56(c)(3).

¶7 "An agency commits procedural error when it replaces a properly authorized deciding official who has already considered an employee's reply to a proposed adverse action and arrived at a decision." *Shiflett v. Department of Justice*, 98 M.S.P.R. 289, ¶ 9 (2005) (citing *Cheney v. Department of Justice*, 720 F.2d 1280, 1281, 1285 (Fed. Cir. 1983)), *review dismissed*, 139 F. App'x 261 (Fed. Cir. 2005). Here, there is no evidence that the Company Commander, rather than the Brigade Commander, was the properly authorized deciding official. Rather, the change in designation was made to be in compliance with written INSCOM policy identifying the proper deciding official. HT at 33-34, 57-58. Moreover, there is no evidence that the Company Commander had considered the appellant's reply and reached a decision before he was replaced. Therefore, the appellant has not shown that there was procedural error. Nor has the appellant articulated how the alleged error was harmful to him. We accordingly find that the appellant has not carried his burden to prove there was harmful error by the agency in the application of its procedures in arriving at the decision on his indefinite suspension.

The Board cannot decide the appellant's claim of disparate treatment.

¶8 The appellant alleged on appeal that his indefinite suspension was the result of prohibited discrimination. IAF, Tab 1. Specifically, the appellant argued that he was subjected to disparate treatment because a female coworker was not indefinitely suspended as he was, although the coworker was also the subject of an agency investigation. *Id.*, Tab 14 (Prehearing Submission Narrative

at 8); HT at 132-33. The record shows that the named coworker was cited in an incident report for being aware of the server the appellant had developed and connected to SIPRNET but not reporting it to management. IAF, Tab 14, Exh. 49. The administrative judge ruled during the prehearing conference that the coworker was not a valid comparator, because the agency did not suspend her access to classified information. *Id.*, Tab 16 at 5. The initial decision did not address the disparate treatment claim. The appellant reiterates this claim on petition for review and also asserts that other employees in the Fort Knox office used the server and no one was disciplined. PFR File, Tab 1 at 11-12.

¶9 The Board generally cannot decide a claim of discrimination in an appeal from an action that was based on suspension or revocation of access to classified material. *Hinton v. Department of the Navy*, 61 M.S.P.R. 692, 697 (1994); *see also Hesse v. Department of State*, 82 M.S.P.R. 489, ¶ 9 (1999), *aff'd*, 217 F.3d 1372 (Fed. Cir. 2000). This is because deciding the discrimination allegation would involve an inquiry into the validity of the agency's reasons for deciding to revoke the appellant's access to classified information. *Hinton*, 61 M.S.P.R. at 697. The Board may not engage in such an inquiry under *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988). Thus, in this appeal, the Board lacks jurisdiction over the appellant's disparate treatment allegation and cannot address it on the merits. *See also Bennett v. Chertoff*, 425 F.3d 999, 1003 (D.C. Cir. 2005) (affirming the dismissal of civil action that alleged the appellant's termination was discriminatory under Title VII of the 1964 Civil Rights Act) (citing *Ryan v. Reno*, 168 F.3d 520, 522 (D.C. Cir. 1999) (an adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII)).[*]

[*] The above analysis assumes without deciding that the Board could adjudicate a claim of disparate treatment alleging that another employee whose security clearance was suspended or revoked was subjected to a less severe adverse action or no adverse action at all. For example, an agency could reassign one employee who lost his security

ORDER

¶10 Accordingly, we AFFIRM the initial decision as modified herein. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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clearance to a position not requiring a clearance while removing a different employee who lost his security clearance; depending on the particular facts, such difference in treatment could constitute prohibited discrimination for which we assume arguendo the Board could order a remedy without interfering with a security clearance determination per se. Here, however, the appellant, who is represented by an attorney, does not make such a claim. Rather, he objects to the agency's decision not to revoke the security clearance of at least one other female co-worker. PFR File, Tab 1 at 11-12. We cannot consider the appellant's claim because to do so would be to delve into issues that are "inextricably intertwined" with the agency's authority over security clearance issues. *See Pangarova v. Department of the Army*, 42 M.S.P.R. 319, 324 (1989).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.